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No. 93-1354

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

SAMUEL LEWIS, DIRECTOR ARIZONA DEPARTMENT OF CORRECTIONS, GRANT WOODS, ARIZONA Attorney General,

PETITIONERS,

-vs-

PETER ALLEN JACOBY,

RESPONDENT,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENTS

I

THE NINTH CIRCUIT COURT OF APPEALS ERRED BY RULING THAT A STATE APPELLATE COURT'S REVIEW FOR FUNDAMENTAL ERROR IN CRIMINAL CASES VITIATES ANY PROCEDURAL BAR CREATED BY A DEFENDANT'S FAILURE TO RAISE AN ISSUE AT TRIAL.

Jacoby does not dispute that the State of Arizona has a contemporaneous objection rule, or that he failed to object to the jury instruction to which he now takes issue. Jacoby argues simply that, because the Arizona Court of Appeals considered the merits of his claim of error as part of a "fundamental error" analysis, he cannot be deemed to have procedurally defaulted on that claim.

Jacoby's argument is inconsistent with a long line of cases from this Court affirming the importance of the contemporaneous objection rule. *See, e.g., Engle v. Isaac*, 456 U.S. 107, 124–29 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Estelle v. Williams*, 425 U.S. 501, 508 n.3 (1976). Contemporaneous objections ensure that the trial court is informed of possible errors and given the opportunity to prevent or correct defects at the time when they are most easily cured. *Engle v. Isaac*, 456 U.S.

at 128–29; *Williams*, 425 U.S. at 508 n.3. This in turn prevents problematic retrials months or years later that unnecessarily burden the system and frustrate the goals of discerning truth and dispensing justice. *Engle*, 456 U.S. at 128–29. In contrast, the failure to timely raise an objection detracts from the significance of the trial, reduces the finality of litigation, and undercuts the State's ability to enforce its procedural rules. *Murray v. Carrier*, 477 U.S. 478, 487 (1986); *Engle*, 456 U.S. at 129. Without the contemporaneous objection rule, the appellate court cannot serve the function for which it was designed and is best suited—reviewing the trial court, rather than deciding issues in the first instance. *Carrier*, 477 U.S. at 487.

In *Engle v. Isaac*, Isaac brought a habeas corpus action challenging the constitutionality of a jury instruction given during his trial in an Ohio state court. Isaac did not object to the instruction at trial, and the Ohio Court of Appeals refused to entertain his challenge to that instruction. The Ohio court cited Isaac's failure to

comply with Ohio's contemporaneous objection rule,[1] and dismissed his claim for lack of a substantial constitutional question. 456 U.S. at 125 n.27. Isaac argued in his habeas petition that, because the Ohio appellate courts engage in a "plain-error" review, and because Ohio courts may excuse procedural default as part of such a review, his claim was not barred from federal habeas review. *Id.*

This Court rejected Isaac's argument. Noting that the Ohio plain-error rule applies only in "exceptional circumstances," such as where, "but for the error, the outcome of the trial clearly would have been otherwise," this Court ruled that the Ohio courts had not excused Isaac's procedural default. *Id.*

The Ninth Circuit's ruling in the present case is inconsistent with *Engle v. Isaac*, and should be rejected by this Court. Although it is unclear whether the Ohio court addressed the merits of Isaac's claim to the same extent as did the Arizona Court of Appeals in the present case, the principles underlying *Engle* are equally applicable in Arizona. The Ninth Circuit's ruling in the present case

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1. Ohio Rule of Criminal Procedure 30 requires contemporaneous objections to jury instructions. 456 U.S. at 125. Failure to comply with Rule 30 bars appellate consideration of an objection. *Id.*

effectively eliminates the contemporaneous objection rule in Arizona. Arizona appellate courts review every criminal case for fundamental error. A.R.S. § 13–4035; *State v. Herrera*, 176 Ariz. 21, 35, 859 P.2d 131, 145, *cert. denied*, 114 S. Ct. 398 (1993). Accordingly, under the rationale suggested by the Ninth Circuit, a criminal defendant in Arizona will *never* be found to have procedurally defaulted on *any* issue raised on appeal even though he or she failed to raise the issue at trial. Such a result wipes out the contemporaneous objection rule, and should be rejected by this Court. As with the defendant in *Engle*, Jacoby procedurally defaulted on his claim that a jury instruction was improper, and that claim should not be addressed as part of a federal collateral review.

Jacoby's reliance on *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), is unavailing. In *Ake*, this Court excused—on direct appeal from the Oklahoma Supreme Court —the defendant's procedural default because "the State had made application of the procedural bar dependent on an antecedent ruling

on federal law."[2] 470 U.S. at 75. At trial, Ake requested a psychiatric evaluation at state expense to determine his mental state at the time of the offense. *Id.* at 72. The trial court rejected his request, and he was unable to present testimony to support his sole defense, insanity. *Id.* Ake filed a motion for new trial, but did not repeat his request for a psychiatric evaluation in that motion. After the motion was denied, Ake filed a direct appeal with the Oklahoma Court of Criminal Appeals, arguing, among other things, that he should have been provided the services of a court-appointed psychiatrist. *Id.* at 73. The Oklahoma Court of Criminal Appeals rejected his argument on the merits, then also ruled that he had waived the claim by not raising it in his motion for a new trial. *Id.* at 74.

On direct review, this Court reversed and ruled that, because under Oklahoma law, federal constitutional errors cannot be waived, the Oklahoma court had necessarily addressed the merits of the federal constitutional claim before applying a procedural bar. Thus,

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2. Under Oklahoma law, federal constitutional claims cannot be waived. *Ake*, 470 U.S. at 74–75.

this Court ruled that Oklahoma had made the application of the procedural bar dependent on an antecedent ruling on federal law, and the issue was preserved for consideration on direct appeal. *Id.* at 74–75.

In Arizona, unlike Oklahoma, federal constitutional claims can be waived. *See State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1185 (1993) (defendant's claims that voir dire was inadequate and that his rights to be present and to be represented by counsel during voire were violated deemed waived because he failed to object at trial); *State v. Holder*, 155 Ariz. 83, 85, 745 P.2d 141, 143 (1987) (*Batson* claim waived by failure to object during voire dire). Thus, the rationale underlying this Court's ruling in *Ake* is not applicable in this case.

Furthermore, *Ake* did not involve the enforcement of a state contemporaneous objection rule. The issue in *Ake* had been presented at trial, and the trial court had been given an opportunity to consider it during trial, when the error could most easily have been cured. *Ake* does not stand for the proposition that the

contemporaneous objection rule should be abolished, and is not controlling in the present case.

Finally, *Ake* was a "direct appeal" to this Court, and did not involve the same concerns present on collateral review. In *Coleman v. Thompson*, ___ U.S. ___, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), this Court noted that *Ake* was a direct review case, and has never been applied in federal habeas cases. 111 S. Ct. at 2560. Because of the concerns of comity and finality present on collateral review, and because of the importance of the contemporaneous objection rule, this Court should not extend *Ake* to this case.

The Ninth Circuit's approach in the present case directly contradicts the approach taken by two other circuit courts of appeal. As noted in the State's Petition for Writ of Certiorari, in *Puleio v. Vose*, 830 F.2d 1197 (1st Cir. 1987), the First Circuit Court of Appeals rejected the same type of "implicit consideration" argument advanced by Jacoby in the present case. Similarly, in *Hayes v. Lockhart*, 766 F.2d 1247 (8th Cir. 1985), the Eighth Circuit Court of Appeals rejected an "implicit consideration" argument. In *Hayes*, the defendant failed to object to what he later claimed was a

defective jury instruction. The Arkansas Supreme Court declined to reach the merits of the claim, but ruled—as part of a "plain error" analysis—that the instruction was not prejudicial. 766 F.2d at 1252. The defendant filed a habeas petition, which was denied by the federal district court. *Id.* The Eighth Circuit affirmed the district court's ruling, rejecting the defendant's argument that, because the Arkansas Supreme Court rejected the claim as part of a "plain error" analysis, the defendant was somehow entitled to an independent federal court determination of the issue. *Id.*

Jacoby's attempt to distinguish *Puleio* is unpersuasive. Jacoby argues that the type of review engaged in by the Massachusetts appellate courts differs from that engaged in by the Arizona courts. Although the terminology employed by the Massachusetts courts may differ from that used by Arizona courts, the differences are minor, and do not provide a basis for distinguishing *Puleio* from the instant case. Massachusetts law provides that state appellate courts may reach the merits of an appeal, notwithstanding procedural default, to determine whether a "miscarriage of justice" likely occurred. *Puleio*, 830 F.2d at 1200. In *Puleio*, the First Circuit noted that the

Massachusetts appellate court's consideration of the alleged instructional error in Puleio's case "went not to the *federal* question of . . . constitutional sufficiency, but to the *state law question of whether a* 'substantial risk of a miscarriage of justice' was present." *Id.*, *citing Gibson v. Butterworth*, 693 F.2d 16, 17 (1st Cir. 1982).

The Massachusetts miscarriage-of-justice review is very similar to the fundamental-error review engaged in by Arizona appellate courts. The "fundamental-error" review by Arizona appellate courts is not simply a review for federal constitutional error. Fundamental error only results upon a finding of "error of such dimension that it cannot be said it is possible for a defendant to have had a fair trial." *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). Furthermore, as noted earlier, the Arizona Supreme Court has ruled that federal constitutional claims can be waived. *Bible*, 175 Ariz. at 572, 858 P.2d at 1185; *Holder*, 155 Ariz. at 85, 745 P.2d at 143. Thus, Arizona's "fundamental-error" review is necessarily a review for something more than simply federal constitutional error. As with the "miscarriage of justice" review in Massachusetts, Arizona's fundamental-error review goes beyond a finding of constitutional

error, and looks to the overall fairness of the trial. The fact that Massachusetts engages in a miscarriage-of-justice review, rather than a fundamental-error review, is a distinction without a difference, and does not provide a basis for distinguishing *Puleio* from the instant case.

II

THE NINTH CIRCUIT ERRED BY REVERSING THE DEFENDANT'S CONVICTIONS FOR THEFT AND TRAFFICKING IN STOLEN PROPERTY ON THE BASIS THAT A JURY INSTRUCTION REGARDING INFERENCES TO BE DRAWN FROM THE POSSESSION OF RECENTLY STOLEN PROPERTY IMPROPERLY SHIFTED THE BURDEN OF PROOF.

Jacoby contends that the fact that he was acquitted of some of the burglary charges against him, while at the same time being convicted of theft, shows that the jury instruction at issue could not have been harmless error. Jacoby argues that because the instruction did not apply to the burglary charges, "it would be difficult to find a clearer demonstration of the impact of an erroneous instruction." (Brief in Opposition to Certiorari, at 12.) The State disagrees because a more plausible explanation for Jacoby's acquittal of some of the burglary charges is the differing elements of proof required to

establish burglary and theft. Pursuant to A.R.S. § 13–1802, theft is defined as unlawfully controlling property of another with the intent to deprive that person of such property. Pursuant to A.R.S. § 13–1507, burglary is defined as the unlawful entrance of a residential structure with the intent to commit a theft. In the present case, the evidence establishing that Jacoby had burglarized several residences was circumstantial; the residences had been burglarized, and the day after the burglaries the property was found in Jacoby's truck. Because there could be differing explanations for how the property turned up in Jacoby's truck, there was a reason the jurors acquitted Jacoby of burglary, while at the same time convicting him of theft.

Finally, Jacoby's argument that his acquittal of a cocaine possession charge demonstrates that the instruction in question was not harmless error is unpersuasive. The fact that he was acquitted of that charge notwithstanding evidence that he was a cocaine user and that a vial of cocaine was found on the seat next to where he was sitting shows nothing more than uncertainty on the part of the jurors regarding who owned the cocaine. There was no such

uncertainty regarding ownership of the stolen property found in Jacoby's truck. Thus, Jacoby's good fortune in being acquitted of a cocaine possession charge does not help him in his attempt to establish that the jury instruction in question was not harmless error.

CONCLUSION

This Court should accept certiorari in this case to resolve the conflict between the Ninth Circuit and the First and Eighth Circuits on the issue of whether a state appellate court's review for fundamental error in a criminal case vitiates any procedural bar created by a defendant's failure to raise an issue at trial. This Court should adopt the approach taken in the First and Eighth Circuits, and reject the Ninth Circuit's decision to address the merits of Jacoby's claim notwithstanding his failure to raise the claim at trial.

This Court should also accept certiorari because the Ninth Circuit erred by finding that the trial court improperly instructed the jurors, and because the Ninth Circuit applied an incorrect harmless error standard. The instruction at issue was not improper, and did

not shift the burden of proof to Jacoby. His convictions should be affirmed.

Respectfully submitted,

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